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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

DONNA HINES,

No. C 07-4145 CW

Plaintiff,

ORDER GRANTING IN
PART DEFENDANTS'
MOTIONS TO DISMISS

v.

CALIFORNIA PUBLIC UTILITIES
COMMISSION, et al.,

Defendants.

/

Defendants California Public Utilities Commission (CPUC), Arocles Aguilar, Dana Appling and Robert Wullenjohn move to dismiss pro se Plaintiff Donna Hines' claims against them. Defendants California State Personnel Board (SPB), Gregory Brown and Floyd Shimomura move separately to dismiss her claims against them. Plaintiff opposes both motions. The matter was taken under submission on the papers. Having considered all of the papers submitted by the parties, the Court grants Defendants' motions in part. The claims that are dismissed pursuant to this order were previously dismissed with leave to amend. Because Plaintiff failed to cure the deficiencies in the first amended complaint as

1 instructed by the Court, those claims are now dismissed with
2 prejudice.

3 BACKGROUND

4 I. Allegations in the First Amended Complaint

5 The Court dismissed the first amended complaint in its
6 entirety. In her second amended complaint, Plaintiff omits many of
7 the facts from the first amended complaint that permit an
8 understanding of the basis of her claims. Because Plaintiff is
9 proceeding pro se, the Court will consider the second amended
10 complaint to incorporate the allegations in the first amended
11 complaint. The following facts either were alleged in the first
12 amended complaint or could be gleaned from documents properly
13 considered on the previous motions to dismiss.

14 A. Discrimination and Retaliation Claims

15 Plaintiff is an African-American woman. She began working for
16 the CPUC in June, 2002 and continues to work there today as a
17 Public Utilities Regulatory Analyst (PURA). "Analysts are
18 responsible for conducting technical and analytical research work
19 as well as consultative and advisory services in the areas of
20 economics, finance, and policy." FAC ¶ 145. According to
21 Plaintiff, her early performance evaluations were uniformly
22 positive and she was promoted in October, 2003.

23 In early 2004, Plaintiff was transferred to the Division of
24 Ratepayer Advocates (DRA), where she began working on the Resource
25 Adequacy Project. She soon became the coordinator of this project,
26 which sought to prevent blackouts in California. Both analysts and
27 attorneys were assigned to the project. Analysts generally wrote
28 "policy recommendations for management review," while attorneys

1 assisted in "drafting policy recommendations, presenting testimony,
2 and submitting briefs before the CPUC." Id. ¶ 149. As the project
3 coordinator, Plaintiff's duties involved "project management,
4 making policy recommendations and reporting to DRA management
5 regarding progress in staff proceedings." Id. ¶ 148. In or around
6 early October, 2004, Defendant Wullenjohn was transferred to the
7 DRA and became Plaintiff's supervisor.

8 Even prior to Mr. Wullenjohn's transfer, Plaintiff had begun
9 to identify problems with the project related to what she
10 characterizes as "malfeasance and deficient staff support." Id.
11 ¶ 56. The "malfeasance" consisted of the failure of two project
12 members to complete their tasks in a satisfactory manner.
13 Specifically, one attorney did not respond to Plaintiff's request
14 that he perform "due diligence and legal assistance" by reviewing
15 drafts of energy contracts to ensure that "taxpayers got a fair
16 deal." Id. ¶¶ 152, 153. In addition, one analyst did not respond
17 to Plaintiff's request that he analyze "feasibility proposals" and
18 comment on whether they were "consistent with engineering norms or
19 standards." Id. ¶ 153. As a result, Plaintiff had to perform much
20 of this work herself. These two team members also failed to
21 coordinate their efforts with Plaintiff and other project members,
22 leading to inefficiency and oversights that Plaintiff maintains
23 negatively impacted the public interest.

24 Plaintiff raised her concerns about her co-workers' poor
25 performance with upper-level DRA management. She was told that she
26 had identified problems that were not limited to her project, but
27 rather were common throughout the division. Shortly after Mr.
28 Wullenjohn began as Plaintiff's supervisor, a senior manager held a

1 meeting to discuss the issues Plaintiff had raised.

2 After the meeting, Mr. Wullenjohn allegedly spoke with
3 Plaintiff and told her that he thought some of the conflict between
4 her and the other project members was attributable to her own
5 actions. Plaintiff claims that this discussion was the beginning
6 of a pattern whereby Mr. Wullenjohn continually held her
7 responsible for the shortcomings of other staff members. Mr.
8 Wullenjohn allegedly began to harass and abuse Plaintiff,
9 chastising and threatening her. While doing this, he exhibited an
10 attitude that Plaintiff maintains "translates" as, "If I tell you
11 to jump, the only thing you need ask is 'How high?'" Id. ¶ 181.
12 He frequently ordered Plaintiff, "If you have a problem, you come
13 to me!" Id. On one occasion, he demanded that Plaintiff talk with
14 him "right there, right now!!" and told Plaintiff that he was using
15 her as a "guinea pig." Id. ¶ 182. "On at least one occasion,
16 Defendant Wullenjohn used offensive gestures towards Plaintiff,
17 i.e., 'flipping the bird.'" Id. ¶ 181.

18 Plaintiff alleges that Mr. Wullenjohn's treatment of her was
19 done in retaliation for her complaints to management about her co-
20 workers. She also claims that it was based on racial animus. To
21 support this latter claim, she alleges that she asked various
22 colleagues if they had experienced problems working with Mr.
23 Wullenjohn. The only employee to complain of the type of "abusive,
24 hostile, bullying behavior" Plaintiff had experienced was African-
25 American as well. Id. ¶ 185.

26 Plaintiff's problems with Mr. Wullenjohn culminated in her
27 January, 2006 performance evaluation, which Mr. Wullenjohn
28 completed. In the evaluation, Plaintiff received the rating,

1 "exceeds expectations" in four categories and the rating, "meets
2 expectations" in three categories. Plaintiff claims that, in her
3 previous evaluations, she had received the rating, "outstanding" in
4 all categories. In addition, under the category, "relationships
5 with people," Mr. Wullenjohn wrote, "Donna has in the past 'flamed'
6 her managers and co-workers in e-mails." Id. ¶ 89. Plaintiff
7 maintains that the evaluation constitutes an adverse employment
8 action taken in retaliation for her complaints and was "grounded in
9 racial animus." Id. ¶ 90.

10 Unable to continue working under such conditions, in February,
11 2006, Plaintiff asked to be reassigned to a different project. Her
12 request was granted, but she continued to report to Mr. Wullenjohn
13 on administrative matters until June, 2006, when she was assigned a
14 new supervisor.

15 Plaintiff also claims that, during her time as the project
16 coordinator, she performed the work of an employee with a higher
17 civil service grade classification than her own PURA III grade, but
18 did not receive the wages to which such an employee would be
19 entitled. She asserts that this was tantamount to being wrongfully
20 denied a promotion. She also alleges that she took civil service
21 exams to qualify for classification as PURA IV and PURA V, each of
22 which is a higher rank than PURA III. Even though she earned a
23 score that made her eligible to apply for several positions, her
24 applications for these positions were rejected. She asserts that
25 this is because the CPUC lacks a "bona fide merit-based system for
26 evaluating, hiring, and promoting staff," which results in a
27 disparate impact on African-American employees. Id. ¶ 122. In
28 addition, when Plaintiff re-took the PURA IV exam at a later date,

1 she was "downgraded to a rating of '3'." Id. ¶ 120. She maintains
2 that this is further evidence of retaliation against her.

3 B. "Obstruction of Justice"

4 On February 23, 2006, Plaintiff filed a complaint of
5 retaliation with the California State Personnel Board (SPB).
6 During the course of the SPB's investigation, Defendant Aguilar, an
7 attorney for the CPUC, allegedly directed several of Plaintiff's
8 co-workers not to answer Plaintiff's "Request for Written
9 Statement," which she had served on them in connection with her SPB
10 case. Mr. Aguilar allegedly did this in collusion with Defendant
11 Appling¹ to deter Plaintiff's co-workers from serving as witnesses.

12 The SPB conducted an investigation into Plaintiff's
13 retaliation complaint and held an informal hearing on January 4,
14 2007. On January 18, it issued a notice of its findings and
15 dismissed Plaintiff's case.² In doing so, it found that Plaintiff
16 had not established by a preponderance of the evidence a claim
17 under the California Whistleblower Protection Act because she had
18 not been subjected to an adverse employment action.

19 Plaintiff claims that the SPB, acting through Defendant
20 Shimomura, its Executive Officer at the time, unlawfully failed to
21

22 ¹The first amended complaint did not specify Ms. Appling's
23 position or provide detailed information about her role in the
24 events giving rise to this lawsuit. The second amended complaint
clarifies that Ms. Appling is the director of the DRA.

25 ²The Court previously took judicial notice of the contents of
26 the SPB decision, although not of the truth of the facts stated
therein, and does so again for the purposes of this motion. See
Intri-Plex Techs., Inc. v. Crest Group, Inc., 499 F.3d 1048, 1052
(9th Cir. 2007) (court may take judicial notice of facts not
27 reasonably subject to dispute, either because they are generally
known, are matters of public record or are capable of accurate and
28 ready determination).

1 provide her with the right-to-sue letter she purportedly needed in
2 order to file a lawsuit in state court. In addition, she claims
3 that, after she filed the present lawsuit, Defendant Brown, the
4 administrative law judge who presided over her case, "destroyed, or
5 allowed to be destroyed," certain "key elements of evidence and/or
6 information" relevant to Plaintiff's claims. Id. ¶¶ 142, 141.

7 C. Plaintiff's Pursuit of Administrative Remedies

8 As noted above, Plaintiff pursued a claim with the SPB.
9 Although she asserts that this claim was based on both
10 discrimination and retaliation, the SPB's decision addresses only a
11 retaliation claim based on California's Whistleblower Protection
12 Act. It does not discuss any allegation that Plaintiff was
13 discriminated against on the basis of her race.

14 The first amended complaint alleged that, after Plaintiff's
15 SPB case was closed, she filed complaints both with the California
16 Department of Fair Employment and Housing and with the Equal
17 Employment Opportunity Commission. Both agencies issued Plaintiff
18 right-to-sue letters.

19 II. Procedural History

20 As noted above, the Court dismissed the first amended
21 complaint in its entirety. The dismissal was with prejudice with
22 respect to Plaintiff's Title VII claims against the individual
23 Defendants and her claims under §§ 1981, 1983 and 1985 against the
24 CPUC and the SPB. Plaintiff was given leave to amend her other
25 claims to allege facts curing the deficiencies discussed by the
26 Court. Because the first amended complaint did not clearly specify
27 the claims Plaintiff was asserting and the legal bases therefor,
28 Plaintiff was directed to organize her second amended complaint

1 around eight potential causes of action identified by the Court:
2 (1) Race Discrimination: Disparate Treatment; (2) Race
3 Discrimination: Hostile Work Environment; (3) Race Discrimination:
4 Failure to Promote; (4) Race Discrimination: Disparate Impact;
5 (5) Retaliation: Title VII; (6) Retaliation: First Amendment;
6 (7) Failure to Afford Due Process: § 1983; and (8) Intentional
7 Infliction of Emotional Distress.³ Plaintiff was also given
8 specific instructions with respect to curing the deficiencies in
9 the first amended complaint. Those instructions are discussed in
10 more detail below.

11 The second amended complaint contains certain new allegations.
12 However, because the allegations are not organized into a
13 narrative, the Court will discuss them below as they relate to the
14 deficiencies identified in the previous order of dismissal.⁴

LEGAL STANDARD

16 A complaint must contain a "short and plain statement of the
17 claim showing that the pleader is entitled to relief." Fed. R.
18 Civ. P. 8(a). Dismissal under Rule 12(b)(6) for failure to state a
19 claim is appropriate only when the complaint does not give the
20 defendant fair notice of a legally cognizable claim and the grounds
21 on which it rests. See Bell Atl. Corp. v. Twombly, 550 U.S. 544,
22 127 S. Ct. 1955, 1964 (2007).

24 ³Plaintiff did not comply with the Court's direction to
organize the second amended complaint in this manner, and thus it
25 is still not clear which allegations she believes support her
various claims.

26 ⁴The second amended complaint contains a number of statements
27 labeled as requests for admissions. Because the Court has already
28 ordered that discovery may not proceed until all motions to dismiss
 have been resolved, these requests for admissions are not operative
 and will be considered merely as allegations of the complaint.

1 In considering whether the complaint is sufficient to state a
2 claim, the court will take all material allegations as true and
3 construe them in the light most favorable to the plaintiff. NL
4 Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
5 Although the court is generally confined to a consideration of the
6 allegations in the pleadings, the court may also consider matters
7 of which judicial notice may be taken. Doing so does not convert
8 the motion into one for summary judgment. United States v.
9 Ritchie, 342 F.3d 903, 909 (9th Cir. 1993). The court will deny a
10 motion to dismiss, unlike a motion for summary judgment, even where
11 the plaintiff is unable to demonstrate that material facts are in
12 dispute.

When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 246-47 (9th Cir. 1990). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990).

DISCUSSION

23 | T. Race Discrimination: Disparate Treatment

24 To state a disparate treatment claim, a plaintiff must allege
25 that: "(1) she belongs to a protected class; (2) she was qualified
26 for her position; (3) she was subject to an adverse employment
27 action; and (4) similarly situated individuals outside her
28 protected class were treated more favorably." Davis v. Team Elec.

1 Co., 520 F.3d 1080, 1089 (9th Cir. 2008). Regarding the third
2 element, "an adverse employment action is one that 'materially
3 affect[s] the compensation, terms, conditions, or privileges of
4 . . . employment.'" Id. (quoting Chuang v. Univ. of Cal. Davis,
5 225 F.3d 1115, 1126 (9th Cir. 2000)) (alteration and omission in
6 Davis).

7 The Court previously noted that the only employment action
8 alleged in the first amended complaint that could be considered
9 adverse (other than harassment and failure to promote, which are
10 treated as separate claims) was Plaintiff's performance
11 evaluation.⁵ But on that evaluation, Plaintiff received the
12 rating, "exceeds expectations" in four categories and the rating,
13 "meets expectations" in three categories. While these ratings may
14 have been lower than those Plaintiff had received in the past, and
15 while Plaintiff found the reference to her "flaming" her co-workers
16 objectionable, she did not allege that she suffered any negative
17 consequence as a result of the evaluation. Because she did not
18 allege that the performance evaluation materially affected the
19 compensation, terms, conditions, or privileges of her employment,
20 the Court found that she had not stated a disparate treatment claim
21 on that basis under either Title VII, § 1981 or § 1983.

22 The Court instructed Plaintiff that, if she chose to assert a
23 race discrimination claim based on disparate treatment in the
24

25 ⁵Plaintiff also alleged that Defendants "stripped" her
26 personnel file of "many of [her] performance evaluations and all of
[the] results of [her] promotional exams." FAC ¶ 100. However, as
27 the Court noted, Plaintiff appears to consider this an act of
28 retaliation for filing the present lawsuit, not an adverse
employment action taken against her because of her race. See SAC
¶ 79.

1 second amended complaint, she must allege facts showing that she
2 was subject to an adverse employment action -- that is, an action
3 that materially affected the compensation, terms, conditions or
4 privileges of her employment. The second amended complaint
5 contains no new allegations concerning the impact of the
6 performance evaluation on the compensation, terms, conditions, or
7 privileges of Plaintiff's employment. Accordingly, this claim is
8 dismissed with prejudice.

9 II. Race Discrimination: Hostile Work Environment

10 In order to state a racial discrimination claim based on a
11 hostile work environment, a plaintiff must allege: (1) that she was
12 subjected to verbal or physical conduct of a racial nature;
13 (2) that the conduct was unwelcome; and (3) that the conduct was
14 sufficiently severe or pervasive to alter the conditions of her
15 employment and create an abusive work environment. Vasquez v.
16 County of Los Angeles, 349 F.3d 634, 642 (9th Cir. 2003).

17 The Court previously noted that, although Plaintiff alleged in
18 the first amended complaint that Mr. Wullenjohn was rude to her on
19 a number of occasions, she did not allege any incidents involving
20 racially tinged statements or acts. Nor did she provide any
21 factual basis for linking Mr. Wullenjohn's treatment of her to her
22 race. Title VII is not a "general civility code," Manatt v. Bank
23 of Am., NA, 339 F.3d 792, 798 (9th Cir. 2003), and thus does not
24 prohibit conduct of the nature Plaintiff described in the first
25 amended complaint. Accordingly, the Court found that she had not
26 stated a hostile work environment claim.

27 The Court also noted that, even if Mr. Wullenjohn's remarks
28 had been motivated by racial animus, in order to constitute a

1 hostile work environment, harassment must be
2 sufficiently severe or pervasive to alter the conditions
3 of the victim's employment and create an abusive working
4 environment. It must be both objectively and
5 subjectively offensive. To determine whether an
6 environment is sufficiently hostile, [courts] look to the
7 totality of the circumstances, including the frequency of
8 the discriminatory conduct; its severity; whether it is
9 physically threatening or humiliating, or a mere
10 offensive utterance; and whether it unreasonably
11 interferes with an employee's work performance.
12
13 Ray v. Henderson, 217 F.3d 1234, 1245 (9th Cir. 2000) (citations
14 and internal quotation marks omitted). The Court explained that,
15 while the remarks described in the first amended complaint may
16 suggest that Mr. Wullenjohn employed a demanding management style,
17 they were not objectively humiliating or derogatory, and did not
18 rise to the level required to state a hostile work environment
19 claim under either Title VII, § 1981 or § 1983.
20
21 The Court instructed Plaintiff that, if she chose to assert a
22 claim for a racially discriminatory hostile work environment in the
23 second amended complaint, she must allege facts showing that she
24 was subjected to verbal or physical conduct of a racial nature, and
25 that such conduct was sufficiently severe and pervasive to alter
26 the conditions of her employment and create an abusive work
27 environment. The second amended complaint contains only two
28 additional allegations related to what may be characterized as
"hostile" behavior on Mr. Wullenjohn's part, and neither of them is
racial in nature. The first is that Mr. Wullenjohn "often hovered
over Plaintiff, barking at her in an aggressive, belligerent tone
(I'm going to make you do 'X'!! I'm going to make you do it,
now!)." SAC ¶ 25. The second is that, in January, 2007, Mr.
Wullenjohn "yelled out" while testifying at Plaintiff's SPB

1 hearing, "I'm going to beat you, Donna. I'm going to beat
2 you. . . beat the aggression out of you." Id. ¶ 37 (punctuation in
3 original). In addition to not being of a racial nature, this
4 latter remark was not made in the workplace, and Mr. Wullenjohn was
5 no longer Plaintiff's supervisor at the time he allegedly uttered
6 it. The addition of these allegations is not sufficient to cure
7 the deficiencies previously identified by the Court, and
8 Plaintiff's hostile work environment claim is therefore dismissed
9 with prejudice.

10 III. Race Discrimination: Failure to Promote

11 To state a Title VII claim for failure to promote, a plaintiff
12 must allege that: "(1) she belongs to a protected class; (2) she
13 applied for and was qualified for the position she was denied;
14 (3) she was rejected despite her qualifications; and (4) the
15 employer filled the position with an employee not of plaintiff's
16 class, or continued to consider other applicants whose
17 qualifications were comparable to plaintiff's after rejecting
18 plaintiff." Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027,
19 1037 (9th Cir. 2005).

20 The Court previously noted that Plaintiff alleged in the first
21 amended complaint that she is a member of a protected class and
22 that she scored well enough on the PURA IV and PURA V exams to make
23 her eligible to apply for positions above her current level. She
24 also alleged generally that she had applied for "several job
25 openings" within the CPUC but was rejected. She did not allege,
26 however, any details about the positions or their specific
27 requirements, including whether they required classification as
28 PURA IV or V. Nor did she allege any details about her

1 applications for the positions or any facts to support a conclusion
2 that she was qualified for them. In addition, she did not allege
3 that the positions for which she applied were filled with
4 individuals who were not African-American. Therefore, the Court
5 found, she had not stated a claim for failure to promote under
6 Title VII, § 1981 or § 1983.

7 The Court instructed Plaintiff that, if she chose to assert a
8 claim for racially discriminatory failure to promote, she must
9 identify each position for which she applied and state her
10 qualifications and the facts and circumstances surrounding her
11 application. The Court also informed Plaintiff that she must
12 allege that she was rejected for each position despite being
13 qualified, and that the position was filled with an employee who
14 was not African-American or that the CPUC continued to consider
15 other applicants whose qualifications were comparable to hers.

16 The second amended complaint provides additional allegations
17 about the positions for which Plaintiff applied. She alleges that
18 she applied for six specific positions between the summer of 2005
19 and the summer of 2007, and that she was "grade eligible" for each
20 position. SAC ¶ 96. She also alleges that her work experience and
21 educational background qualified her for the positions, but that
22 non-African-American applicants were selected. While the factual
23 details of Plaintiff's failure to promote claim must be further
24 developed through discovery, the second amended complaint contains
25 allegations sufficient to overcome a motion to dismiss.

26 IV. Race Discrimination: Disparate Impact

27 "To establish a prima facie case of disparate impact under
28 Title VII, [a] plaintiff[] must: (1) show a significant disparate

1 impact on a protected class or group; (2) identify the specific
2 employment practices or selection criteria at issue; and (3) show a
3 causal relationship between the challenged practices or criteria
4 and the disparate impact." Hemmings v. Tidyman's Inc., 285 F.3d
5 1174, 1190 (9th Cir. 2002).

6 In the first amended complaint, Plaintiff asserted in general
7 terms that the CPUC lacks a "bona fide merit-based system" for
8 hiring and promotion, and that this has a disparate impact on
9 African-Americans. However, the complaint did not identify any
10 specific facially neutral practice, let alone provide a factual
11 basis for concluding that such a practice has a disparate impact on
12 the hiring or promotion of African-Americans and affected Plaintiff
13 specifically. See FAC ¶¶ 121-22.

14 The Court informed Plaintiff that, if she chose to assert a
15 disparate impact discrimination claim in the second amended
16 complaint, she must identify a specific facially neutral employment
17 practice and must allege facts sufficient to conclude that the
18 practice has a disparate impact on African-American employees,
19 including herself. The second amended complaint contains
20 additional allegations concerning the CPUC's unfair promotion
21 practices. However, the gist of these allegations is unchanged:
22 the CPUC's promotional policies give supervisors too much
23 discretion to impose their personal preferences on the selection
24 process, which results in the promotion of unqualified individuals
25 and leads to under-representation of African-American employees.
26 However, this amounts to a claim that certain employees are
27 intentionally treated differently from others because of, at least
28 in part, their race. Plaintiff has not identified any particular

1 facially neutral policy and explained how it has a disparate impact
2 on African-American employees. This promotion claim is essentially
3 based on disparate treatment, not disparate impact. As explained
4 above, Plaintiff may pursue her disparate treatment claim for
5 failure to promote. The disparate impact claim, however, is
6 dismissed with prejudice.

7 V. Retaliation: Title VII

8 To establish a prima facie case for Title VII retaliation, a
9 plaintiff must show that: (1) she engaged in an activity protected
10 under Title VII; (2) her employer subjected her to an adverse
11 employment action; and (3) there was a causal link between the
12 protected activity and the employer's action. Davis, 520 F.3d at
13 1093-94.

14 The Court previously found that Plaintiff had neither:
15 1) alleged an adverse employment action, as discussed above; nor
16 2) alleged that she engaged in an activity protected under Title
17 VII. With respect to protected activity, Plaintiff alleged in the
18 first amended complaint that she was retaliated against, not for
19 speaking out against a discriminatory practice, but for complaining
20 about the poor performance of her co-workers. This kind of
21 activity does not fall within the purview of Title VII's
22 protections.

23 The Court informed Plaintiff that, if she chose to assert a
24 retaliation claim under Title VII in the second amended complaint,
25 she must allege that she suffered a particular adverse employment
26 action as the result of engaging in specifically described activity
27 related to Title VII's protection against race discrimination. As
28 discussed above, the second amended complaint does not allege that

1 an adverse employment action was taken against Plaintiff prior to
2 the initiation of this lawsuit. Nor does it allege that any
3 purported adverse employment action before the lawsuit was filed
4 was taken as a result of Plaintiff's protected activity; it
5 continues to allege that Plaintiff was retaliated against because
6 of her complaints about her co-workers' inefficiency. Plaintiff
7 therefore has failed to state a Title VII retaliation claim based
8 on events that transpired prior to this lawsuit, and any such claim
9 is dismissed with prejudice.

10 Like the first amended complaint, the second amended complaint
11 alleges that, two months after Plaintiff filed this lawsuit, her
12 personnel file was "stripped" of her performance evaluation.
13 However, unlike the first amended complaint, the second amended
14 complaint articulates a basis for concluding that this constituted
15 an adverse employment action. According to Plaintiff, because a
16 current performance evaluation was required before any CPUC
17 employee could be considered for a promotion, she could not be
18 promoted until her review was replaced some months later. There
19 were allegedly "numerous" promotional opportunities that she could
20 have pursued in the interim. SAC ¶ 81. While the complaint's
21 allegations on this matter are somewhat sparse, they are sufficient
22 to state a Title VII retaliation claim.

23 VI. Retaliation: First Amendment

24 To prevail on a claim that a government employer punished a
25 public employee for exercising her free speech rights, a plaintiff
26 must show: (1) that she engaged in constitutionally protected
27 speech; (2) that the defendant took an adverse employment action
28 against her; and (3) that her speech was a substantial or

1 motivating factor in the adverse action. See Pool v. VanRheen, 297
2 F.3d 899, 906 (9th Cir. 2002). Not every statement of interest to
3 the public is protected by the First Amendment. When public
4 employees make such statements "pursuant to their official duties,"
5 they "are not speaking as citizens for First Amendment purposes,
6 and the Constitution does not insulate their communications from
7 employer discipline." Garcetti v. Ceballos, 547 U.S. 410, 421
8 (2006).

9 In its previous order of dismissal, the Court noted that
10 Plaintiff described her duties as an analyst to include "conducting
11 technical and analytical research work as well as consultative and
12 advisory services in the areas of economics, finance, and policy."
13 FAC ¶ 145. As the coordinator of the Resource Adequacy Project,
14 Plaintiff was responsible for "project management, making policy
15 recommendations and reporting to DRA management regarding progress
16 in staff proceedings." Id. ¶ 148. The Court noted that the speech
17 Plaintiff claimed was protected by the First Amendment consisted of
18 her complaints to DRA management that two of her co-workers were
19 failing to discharge their duties in a satisfactory manner.
20 Plaintiff alleged that this was a matter of public concern because
21 the CPUC's ability to prevent blackouts and ensure that the State's
22 energy contracts are fair is critical to the public welfare.

23 The Court concluded that, in the first amended complaint,
24 Plaintiff had not alleged that she engaged in any speech that did
25 not fall within the self-described responsibilities of her
26 position. To the contrary, raising her concerns with the
27 performance of project members was inherently a function of her
28 duty to manage the project and report progress to DRA management.

1 Therefore, the Court held that, pursuant to Garcetti, Plaintiff had
2 not stated a claim.

3 Additionally, even if Plaintiff's speech were constitutionally
4 protected, the Court noted that Plaintiff had not alleged that she
5 suffered any adverse employment action as a result of it. As
6 discussed above, her performance evaluation did not constitute an
7 adverse action under the applicable legal standard. And although a
8 hostile work environment may serve as the basis for a retaliation
9 claim, Plaintiff had not alleged harassment of the type giving rise
10 to a hostile work environment.

11 Finally, because "federal courts give preclusive effect to the
12 findings of state administrative tribunals in subsequent actions
13 under § 1983," Miller v. County of Santa Cruz, 39 F.3d 1030, 1032
14 (9th Cir. 1994), the Court found that Plaintiff's First Amendment
15 claim was presumptively barred by the SPB's finding that no adverse
16 employment action was taken against her. The Court explained that,
17 as long as the fairness requirements described in United States v.
18 Utah Construction & Mining Co., 384 U.S. 394, 422 (1966), were met,
19 it was required to give the same preclusive effect to the SPB's
20 determinations as those determinations would be given in California
21 courts. The Utah Construction fairness requirements are "(1) that
22 the administrative agency act in a judicial capacity, (2) that the
23 agency resolve disputed issues of fact properly before it, and
24 (3) that the parties have an adequate opportunity to litigate."
25 Miller, 39 F.3d at 1033.

26 The Court stated that it was clear the SPB was acting in a
27 judicial capacity when it adjudicated Plaintiff's whistleblower
28 retaliation complaint, and that the agency resolved issues of fact

1 that were properly before it. See Cal. Gov't Code § 19683. In
2 addition, the Court noted, California courts give preclusive effect
3 to findings made by the SPB, even without the benefit of a full
4 evidentiary hearing. See Cal. Pub. Employees Ret. Sys. v. Superior
5 Court, 160 Cal. App. 4th 174, 177-78 (2008). Thus, the Court found
6 that the SPB's decision must be given preclusive effect unless
7 Plaintiff was not given an adequate opportunity to litigate.

8 The Court concluded that Plaintiff's vague and conclusory
9 claim that the SPB failed to follow proper procedures was not
10 supported by any factual allegations in the first amended
11 complaint. The Court also found that Plaintiff's allegations in
12 her other court submissions, which focused on the fact that the SPB
13 employed an "informal" hearing process to consider her claim, did
14 not support the conclusion that she was not given an adequate
15 opportunity to present her case. Because there was no reason to
16 deny the SPB proceedings preclusive effect, and because the SPB
17 found that Plaintiff had not suffered an adverse employment action,
18 the Court found that Plaintiff was precluded from claiming
19 otherwise.

20 The Court informed Plaintiff that, if she chose to assert a
21 First Amendment retaliation claim in the second amended complaint,
22 she must allege that she was retaliated against for speech that was
23 made other than pursuant to her duties as a CPUC employee. She was
24 also informed that she must further allege facts showing that she
25 was subject to an adverse employment action or a hostile work
26 environment. In addition, the Court informed Plaintiff that any
27 First Amendment retaliation claim would be precluded unless she
28 alleged specific facts showing that she was not given an adequate

1 opportunity to litigate her whistleblower retaliation claim before
2 the SPB.

3 The second amended complaint does not cure any of the three
4 deficiencies identified by the Court. As discussed above,
5 Plaintiff has not alleged in anything other than conclusory terms
6 that she suffered an adverse employment action.⁶ In addition, the
7 entire premise of her claim -- that she was retaliated against for
8 speaking out against the incompetence of her co-workers -- is based
9 on conduct that was made pursuant to her official duties and thus
10 was not protected by the First Amendment. Finally, although the
11 second amended complaint contains new allegations concerning
12 deficiencies in the SPB proceedings, they do not support the
13 conclusion that Plaintiff was not given an adequate opportunity to
14 present her claim. She continues to fault Mr. Brown for not
15 granting her "Motion to Convert Hearing to a Formal Hearing and
16 Investigatory Proceeding," SAC ¶ 49, but she does not explain how
17 this affected her ability to present her case and does not show
18 that she was legally entitled to any such formal hearing. She
19 continues to maintain that no witness testimony was given at the
20 hearing, even as she submits hearing transcripts demonstrating
21 unequivocally that testimony was given. Her contention is
22 apparently based on a distinction she draws between "testimony" and
23 "narrative testimony." The difference between the two is not
24 clear, but Plaintiff appears to define the latter as testimony by a

25
26 ⁶Although Plaintiff has stated a Title VII claim based on the
27 removal of the performance evaluation from her file, this claim is
28 distinct from her First Amendment retaliation claim. Her Title VII
claim is based on alleged retaliation for filing this lawsuit,
whereas her First Amendment claim is based on alleged retaliation
for speaking out against her co-workers' poor performance.

1 witness who is not subject to cross-examination. In any event, as
2 the Court noted previously, Plaintiff has cited no case standing
3 for the proposition that an administrative proceeding that employs
4 relaxed evidentiary standards, does not permit cross-examination or
5 operates on a shortened time frame necessarily fails to offer
6 participants a fair opportunity to litigate under the Utah
7 Construction standard. Moreover, Plaintiff had the opportunity to
8 challenge the adequacy and propriety of the SPB's procedures by
9 seeking a writ of mandate in state court setting aside the agency's
10 decision. Cal. Code Civ. Proc. § 1094.5. She did not do so.

11 Because Plaintiff did not cure the deficiencies in the first
12 amended complaint, her First Amendment retaliation claim is
13 dismissed with prejudice.

14 VII. Due Process

15 A two-part test applies to a claim for denial of the
16 Fourteenth Amendment's guarantee of due process:

17 The first inquiry in every due process challenge is
18 whether the plaintiff has been deprived of a protected
19 interest in "property" or "liberty." See U.S. Const.,
20 Amdt. 14 ("nor shall any State deprive any person of
21 life, liberty, or property, without due process of law");
Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 47
L.Ed.2d 18 (1976). Only after finding the deprivation of
a protected interest do we look to see if the State's
procedures comport with due process.

22 Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 59 (1999).

23 The Court previously found that it did not appear from the
24 allegations in the first amended complaint that Plaintiff had a
25 liberty interest at stake in the SPB proceedings. The Court also
26 found that, even if such an interest had been at stake, her vague
27 allegations of procedural deficiencies were insufficient to state a
28 due process claim against either Mr. Brown or Mr. Shimomura.

1 The Court informed Plaintiff that, if she chose to assert a
2 due process claim in the second amended complaint, she must allege
3 facts sufficient to show that she had a liberty interest at stake
4 in the SPB proceedings. She was also informed that she must
5 identify the specific actions Defendants Brown and Shimomura
6 allegedly took to interfere with her due process rights, and must
7 allege facts sufficient to conclude that these actions actually
8 deprived her of due process.

9 The second amended complaint does not make any additional
10 factual allegations concerning the interest that was at stake in
11 the SPB proceedings. Although Plaintiff argues that she "has a
12 liberty interest to pursue employment opportunities," SAC at 17,
13 she does not explain how the SPB proceedings impacted her ability
14 to pursue employment opportunities. In addition, while she makes
15 certain additional allegations against Mr. Brown, they do not
16 amount to a due process violation. Specifically, she claims that
17 he allowed Mr. Wullenjohn's testimony about his desire to "beat the
18 aggression out" of Plaintiff to be erased from the audio recording
19 of the proceedings. This apparently happened when he attempted to
20 erase a portion of the tape that had inadvertently recorded a
21 privileged attorney-client communication. She also claims that Mr.
22 Brown is withholding the complete version of the recording, despite
23 her request that he release it. Even if this constituted
24 inappropriate conduct, however, Plaintiff does not allege that the
25 SPB proceeding itself was affected by it.

26 Plaintiff also recasts her "obstruction of justice" claims
27 against Defendants Appling and Aguilar as claims for "interference
28 with due process." The claims, however, are based on the same

1 conduct and, as explained in the Court's prior order, no
2 constitutional claim can lie for Ms. Appling's and Mr. Aguilar's
3 alleged attempts to persuade CPUC employees not to cooperate with
4 Plaintiff during her investigation.

5 Because Plaintiff did not cure the deficiencies identified by
6 the Court, her due process claim is dismissed.

7 VIII. Intentional Infliction of Emotional Distress

8 The Court previously dismissed Plaintiff's claim for the
9 common law tort of intentional infliction of emotional distress
10 because: 1) she did not first file an administrative claim pursuant
11 to the California Tort Claims Act (TCA), as she was required to do,
12 see Cal. Gov't Code § 945.4; and 2) she did not allege conduct so
13 extreme as to "exceed all bounds of that usually tolerated in a
14 civilized community," Cervantez v. J.C. Penney Co., Inc., 24 Cal.
15 3d 579, 593 (1979), or distress so severe "that no reasonable
16 [person] in a civilized society should be expected to endure it,"
17 Fletcher v. W. Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 397
18 (1970). The Court informed Plaintiff that, if she chose to assert
19 a claim for intentional infliction of emotional distress, she must
20 allege that she complied with the claims-presentation requirements
21 of the TCA and must allege facts showing that she was subjected to
22 extreme and outrageous conduct exceeding all bounds of that usually
23 tolerated in a civilized community. The second amended complaint
24 does neither of these things. Accordingly, the claim for
25 intentional infliction of emotional distress is dismissed with
26 prejudice.

27 CONCLUSION

28 For the foregoing reasons, Defendants' motions to dismiss

1 (Docket Nos. 103 and 107) are GRANTED IN PART and DENIED IN PART.
2 Plaintiff may proceed with: 1) her Title VII claim against the CPUC
3 for failing to promote her on the basis of her race; and 2) her
4 Title VII claim against the CPUC for "stripping" her performance
5 review from her personnel file in retaliation for filing this
6 lawsuit. All other claims are dismissed with prejudice.⁷

7 A case management conference is scheduled for March 3, 2009 at
8 2:00 p.m. The parties must file separate case management
9 statements by February 17, 2009.⁸ Plaintiff may not serve any
10 discovery requests until after the case management conference.

11 IT IS SO ORDERED.

Claudia wilken

12
13 CLAUDIA WILKEN
14 United States District Judge
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24 ⁷Plaintiff's motion for leave to file her opposition brief
late and over the page limit (Docket No. 112) is GRANTED. The
25 parties' requests for judicial notice are DENIED except as
otherwise noted in this order.
26

27 ⁸Plaintiff is referred to the Standing Order for All Judges of
the Northern District of California -- Contents of Joint Case
Management Statement, which can be found on the Court's website at
28 <http://www.cand.uscourts.gov>.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DONNA HINES,

Plaintiff,

Case Number: CV07-04145 CW

ALIFORNIA PUBLIC UTILITIES
COMMISSION et al.

Defendant.

CERTIFICATE OF SERVICE

10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on February 3, 2009, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
in the Clerk's office.

Donna Hines
268 Bush Street, #3204
San Francisco, CA 94104

Dated: February 3, 2009

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk